



## **Case Summary**

Kenneth Bailey (“Bailey”) appeals the Indiana Worker’s Compensation Board’s (“Board”) decision that Bailey is not permanently and totally disabled. Specifically, Bailey argues that the Board’s order lacks the specificity necessary to permit meaningful appellate review, that certain of the Board’s findings of fact are not supported by the evidence, and that the Board erred as a matter of law in concluding that he is not permanently and totally disabled. Finding no error, we affirm the decision of the Board.

## **Facts and Procedural History**

On June 28, 2001, Bailey was injured when he fell from a scaffold while working for Dutchmen Manufacturing (“Dutchmen”). His injuries included a right distal radius fracture, a non-displaced basilar skull fracture of the right occipital bone and right supra orbital bone, and impaired hearing in his left ear.<sup>1</sup> After Bailey received emergency treatment, Dutchmen authorized Dr. Joan Szynal (“Dr. Szynal”) to coordinate Bailey’s medical treatment, and Bailey began receiving temporary total disability benefits.

In late 2001, Bailey saw Dr. Michael Disher (“Dr. Disher”), who diagnosed Bailey with vestibular impairment.<sup>2</sup> On January 30, 2002, Dr. Szynal assigned Bailey 12% whole person impairment for the injury to his right arm, 27% whole person impairment for his left side hearing loss, and 15% whole person impairment for vestibular impairment. Dr. Szynal’s conclusions were based upon her treatment of Bailey and her

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<sup>1</sup> The parties filed a stipulation stating that Bailey suffered impaired hearing in his right ear, but Bailey’s own testimony and the findings of fact of the Worker’s Compensation Board indicate that Bailey actually lost hearing in his left ear.

<sup>2</sup> “Vestibular” means “relating to the sense of equilibrium.” WordNet 3.0, *available at* <http://wordnet.princeton.edu/3.0> (last accessed May 15, 2007).

review of medical records and reports from other treating physicians and therapists, including Dr. Disher. Applying the American Medical Association's Combined Values Chart, Dr. Szynal reached a whole person impairment of 45%. Dr. Szynal determined that the vestibular impairment limited Bailey's ability to read, stand, and walk due to dizziness and loss of balance and concluded, "I also doubt that [Bailey] would be able to tolerate full-time employment." Appellant's App. p. 84. On March 7, 2002, Bailey filed an Application for Adjustment of Claim ("Claim") with the Board. Because the parties were unable to agree on the final adjustment of Bailey's Claim, they proceeded toward a hearing before a single Board hearing member.

On May 21-22, 2003, while Bailey's Claim was pending, Dutchmen conducted surveillance investigation of Bailey. The surveillance videos show Bailey mowing his lawn, clearing his sidewalk with a leaf blower, walking without a cane, and driving an automobile. Dr. Szynal viewed the videos and noted that Bailey performed the tasks "without any difficulty whatsoever" and without losing his balance. *Id.* at 80. Nonetheless, the videos also show Bailey visiting Dr. Szynal's office with the aid of a cane. After viewing the surveillance videos, Dr. Szynal wrote in a letter, "I am absolutely shocked after reviewing the surveillance tape. The patient that I have treated for months for severe vertigo and dizziness and is obviously embellishing his symptoms. A patient with vertigo cannot operate a lawn mower and leaf blower with such ease as Mr. Bailey displayed." *Id.* Dr. Szynal then revised her impairment ratings for Bailey to 14% whole person impairment for left side hearing loss and 12% whole person

impairment for his right arm injuries, which equate to a whole person impairment of 24%.

Dr. Disher saw Bailey again in September 2004 at the request of Bailey's attorney. One of the tests Dr. Disher performed revealed an "aphysiologic sway," which suggests "faking" or exaggeration or anxiety. *Id.* at 403, 474. At the time of his 2004 evaluation of Bailey, Dr. Disher did not know about and had not seen the surveillance videos. During Dr. Disher's deposition, held on January 13, 2005, the following exchange took place between counsel for Dutchmen—Attorney O'Gallagher—and Dr. Disher:

Attorney O'Gallagher: "So we don't have an impairment rating as to his situation now. Correct? You didn't provide any rating. Right?"

Dr. Disher: "No."

Attorney O'Gallagher: "And you're not providing a rating here today, are you?"

Dr. Disher: "Right. Correct."

Attorney O'Gallagher: "And you're not aware of any other rating that we have talked about or put into evidence. Right?"

Dr. Disher: "Right. Correct."

*Id.* at 396-397. Then, when Bailey's attorney asked Dr. Disher for a reasonable estimation of the degree of Bailey's impairment related solely to Dr. Disher's specialty—vestibular dysfunction—Dr. Disher stated that he was "uncomfortable here giving an exact number not having evaluated the patient." *Id.* at 440. Further pressed, Dr. Disher went on to state, "Not having seen the patient and based on anything I've seen, I'd

probably be more somewhere in mid to high Class II<sup>[3]</sup>,” which would be somewhere between 5% and 10% permanent partial impairment. *Id.* at 441-42. In offering that estimate, Dr. Disher testified, “I’m kind of accepting data that you guys are relating to me.” *Id.* at 443-44.

In advance of the hearing before the Single Hearing Member, Bailey’s counsel, Attorney Parkman, hired vocational expert Christopher Young (“Young”). Young has served as a vocational expert for Attorney Parkman at least twenty to twenty-five times, and of the approximately 500 worker’s compensation claimants Young has assessed, he has found all but twenty of them to be disabled. In his Disability Evaluation Report, Young described his meeting with Bailey as follows:

I could see immediately that he was having extreme difficulty in navigating. He utilized a cane that was well worn and supported himself on the table as he walked. When he spoke, he related with his eyes frequently closed, and one time he had to go to the bathroom during the interview which was a matter of some urgency for him. Again, his movements were clumsy and seemed exceedingly difficult.

*Id.* at 636. Young evaluated Bailey without viewing the surveillance videos. In his deposition, he stated that such videos are “ridiculous” and never play a part in his opinions. *Id.* at 570. Likewise, Young did not personally perform any tests on Bailey to determine his physical and mental capabilities and did not conduct a transferable skills analysis or a labor market survey. Nonetheless, Young concluded his report by stating, “I

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<sup>3</sup> “Class II” refers to the impairment ratings in Table 11-4 in the AMA Guides to the Evaluation of Permanent Impairment, entitled “Criteria for Rating Impairment Due to Vestibular Disorders.” Linda Cocchiarella & Gunnar B.J. Andersson, Am. Med. Ass’n, Guides to the Evaluation of Permanent Impairment 253 (5th ed. 2001). Class II vestibular impairment is defined as 1%-10% impairment of the whole person and is indicated as follows: “Symptoms or signs of vestibular disequilibrium present with supporting objective findings *and* activities of daily living can be performed without assistance, except for complex activities (eg, riding a bicycle) or certain types of demanding activities related to an individual’s work (eg, walking on girders or scaffolds).” *Id.*

have no hesitation whatsoever in stating that in my professional opinion there would be no work that Mr. Bailey could be expected to perform now or for the foreseeable future.” *Id.* at 638. In particular, Young concluded that Bailey would be unable to work as a security guard based largely on Bailey’s “equilibrium problems,” that is, his vestibular dysfunction. *Id.* at 531.

Judith Sher (“Sher”), Dutchmen’s vocational expert, also examined Bailey. During a four-hour evaluation, Sher performed several tests on Bailey to measure his physical and cognitive abilities. *See id.* at 647-48, 853-54. In addition, Sher conducted a transferable skills analysis and a labor market survey. After evaluating and testing Bailey, Sher created an eleven-page report detailing her findings. She concluded that Bailey is able to do assembly work. Specifically, Sher mentioned jobs with Forge Industrial and Manpower in Elkhart, Indiana, and found that an assembler could earn between \$20,788.00 and \$26,183.00 in Elkhart or South Bend. Sher based her conclusion that Bailey could do assembly work in part on the surveillance video, which showed Bailey “walking and standing and operating vibrating tools.” *Id.* at 855.

Sher also found that because of Bailey’s experience in the military and as a police officer, he could get work as a security guard. Again, she relied in part on the surveillance video for this conclusion, stating, “Since he was observed performing activities without the cane he is now a candidate for guard work.” *Id.* Sher noted that the Chicago Tribune listed security jobs in the LaPorte, Indiana, area and that “Securitas USA appears to have a number of contracts in the Indiana area.” *Id.* According to Sher,

the Economic Research Institute has calculated a mean salary of \$20,017.00 for first-year guards and an “all-incumbent average” of \$24,084.00. *Id.*

On the final page of her report, Sher wrote:

Mr. Bailey said the reason he is unable to return to work is because he is tired and he has a loss of balance. His doctor, Dr. Mahon, said he is not to use power tools as of January 2, 2002. He was using power tools during the time he was observed caring for his lawn in May 2003.

His functional evaluation states he is able to use his hands for repetitive action and can use his head and neck in a static position. It was suggested he return to work sitting. However, given the surveillance tape, it would appear that he is able to do more than just sit.

*Id.* at 856.

On the day of the hearing before the Single Hearing Member, the parties submitted a Stipulation, which stated, “The contested issues are whether [Bailey] is totally and permanently disabled and if not what is the proper degree of permanent partial impairment. A further issue is what, if any, future medical benefits should be the responsibility of [Dutchmen].” *Id.* at 41. After holding a hearing and reviewing the depositions and exhibits, the Single Hearing Member issued the following relevant Findings of Fact and Conclusions of Law:

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3. That [Bailey] is also alleging permanent and total disability, and the Boards [sic] finds that [Bailey] is not permanently and totally disabled.

\* \* \* \*

5. That the only physician who has rendered any competent PPI [Permanent Partial Impairment] ratings in writing, per [Indiana Code §] 22-3-3-6, and pursuant to the AMA [American Medical Association] Guide[s] to the Evaluation of Permanent Impairment, is Dr. Joan Szynal.

6. That by report dated September 3, 2003, Dr. Szynal has assessed the following impairment ratings to which [Bailey] is entitled: 12% of whole person impairment for injury to right arm; 14% of whole person impairment for left side hearing loss; with a resulting 24% of whole person impairment using the AMA Guides Combined Values Chart.

7. That [Bailey] has not presented any other competent evidence of an impairment rating for either the alleged vestibular dysfunction or any contrary rating to the final ratings assigned by Dr. Szynal in September 2003 for the right arm and left side hearing loss.

8. That Dr. Szynal's July 24, 2003 report reviews the surveillance video evidence from May 21 and 22, 2003, which show, contrary to [Bailey's] representations to Dr. Szynal, that he was able to perform the following functions:

- a) drive an automobile;
- b) mow his lawn with a push mower without difficulty and without ever losing his balance;
- c) twist [and] turn the mower without difficulty;
- d) operate a gas powered leaf blower to clear pathways around his home for several minutes and easily move gas powered leaf blower and rotate with it;
- e) failure to utilize any type of assistive device, such as a cane, and do so without any balance difficulties whatsoever.

9. That Dr. Szynal's review of the surveillance videotapes and her report of July 24, 2003, demonstrably indicate that [Bailey] falsely reported his symptoms and complaints to Dr. Szynal for the purpose of increasing his chances for an award of permanent total disability in this case, as well as an award of impairment for vestibular dysfunction, when in reality there is no such permanent impairment.

10. That Dr. Szynal explained her reasoning as follows:

"I am absolutely shocked after reviewing the surveillance tape. The patient that I have treated for months for severe vertigo and dizziness and is obviously embellishing his symptoms. A patient with vertigo cannot operate a lawn mower and leaf blower with such ease as Mr. Bailey displayed."

11. That, accordingly, Dr. Szynal properly rated [Bailey] at "no impairment" for any vestibular dysfunction.



12. That while it is true that [Bailey] could be expected to improve over time in regard to any problems of dizziness or vertigo, the radical difference between his account of his own complaints, for self-serving reasons, while treating with Dr. Szynal and Dr. Disher, compared to the reality of what was indicated, during even a short period of surveillance, is startling. This is convincing evidence that [Bailey] did not have any permanent impairment for his vestibular problems, or at least no significant permanent impairment such as [Bailey] has alleged.

13. That Dr. Disher was not able to make a finding, to a reasonable degree of medical certainty, as to [Bailey's] impairment for vestibular dysfunction because the only basis was self-serving, speculative and subjective facts supplied by [Bailey's] counsel in his questioning, which Dr. Disher could not completely rely upon.

*Id.* at 7-8.

Based on his findings and the stipulations of the parties, the Single Hearing Member concluded that Bailey is not entitled to an award of permanent and total disability, has no impairment for any vestibular problems, and has a combined values chart rating of 24% of the whole person impairment based on 12% whole person impairment for the right arm and 14% whole person impairment for left side hearing loss.

*Id.* at 9. Bailey appealed the Single Hearing Member's award to the full Board. The full Board issued an order ("Order") adopting the decision of the Single Hearing Member. Bailey now appeals to this Court.

### **Discussion and Decision**

On appeal, Bailey raises several issues, which we consolidate and restate as whether the Board's Order is sufficiently specific to permit intelligent appellate review, whether certain of the Board's findings of fact are supported by the evidence, and whether the Board erred in concluding that Bailey is not permanently and totally disabled.

Bailey is appealing from a negative judgment. In an appeal from a negative judgment by the Board, we will neither reweigh the evidence nor judge the credibility of witnesses. *Hill v. Worldmark Corp./Mid America Extrusions Corp.*, 651 N.E.2d 785, 786 (Ind. 1995). Rather, we examine the record only to determine whether there are any substantial evidence and reasonable inferences that can be drawn therefrom to support the Board's findings and conclusion. *Id.* Only if the evidence is of a character that reasonable persons would be compelled to reach a conclusion contrary to the decision of the Board will it be overturned. *Id.* In other words, unless the evidence is undisputed and leads inescapably to a result contrary to the Board's finding, it will be affirmed. *Id.* at 787.

### **I. Specificity of the Board's Order**

Bailey briefly argues that the Board's Finding 3—"That [Bailey] is also alleging permanent and total disability, and the Boards [sic] finds that [Bailey] is not permanently and totally disabled."—lacks the specificity necessary to permit intelligent review of the Board's rationale and conclusion. Bailey is correct that the Board has an obligation to enter specific findings of fact that support its ultimate conclusions of law, and the findings must be stated with sufficient specificity, with regard to contested issues, so as to allow intelligent review. Ind. Code § 22-3-4-7; *Graycor Industrial v. Metz*, 806 N.E.2d 791, 797 (Ind. Ct. App. 2004), *trans. denied*. Without question, Finding 3, standing alone, would warrant a decision to remand the cause for more specific findings of basic fact. *See Perez v. U.S. Steel Corp.*, 426 N.E.2d 29, 30 (Ind. 1981). But Finding 3 does not stand alone. Rather, it is just one of thirteen findings entered by the Board. Most of

the Board's findings—specifically, Findings 5-13—support the Board's ultimate conclusion that Bailey is not permanently and totally disabled. *See* Appellant's App. p. 7-8. Bailey does not challenge the specificity of the other findings, and we find them to be sufficient to allow intelligent appellate review of the Board's Order.

## **II. Sufficiency of the Evidence**

In the alternative to his argument that the Board's Order lacks the specificity necessary to permit meaningful review, Bailey contends that several of the Board's findings are not supported by the evidence. Specifically, Bailey challenges Findings 5, 7, and 13. Each of these is a finding of fact. To reiterate, when reviewing a decision of the Board, we are bound by the factual determinations of the Board unless the evidence is undisputed and leads inescapably to a contrary conclusion. *Hill*, 651 N.E.2d at 787.

Bailey first challenges the Board's Findings 5 and 7. The Board's Finding 5 provides: "That the only physician who has rendered any competent PPI ratings in writing, per IC 22-3-3-6, and pursuant to the AMA Guide to the Evaluation of Permanent Impairment, is Dr. Joan Szynal." Appellant's App. p. 7. The Board's Finding 7 provides: "That [Bailey] has not presented any other competent evidence of an impairment rating for either the alleged vestibular dysfunction or any contrary ratings assigned by Dr. Szynal in September 2003 for the right arm and left side hearing loss." *Id.* Bailey contends that in addition to Dr. Szynal, Dr. Disher also rendered a competent impairment rating. But there is substantial evidence to the contrary.

During his deposition, Dr. Disher testified that he had not provided an impairment rating for Bailey and would not be doing so during the deposition. *See id.* at 396-97.

When asked by Bailey’s counsel to provide a reasonable estimation of the degree of Bailey’s impairment related solely to Dr. Disher’s specialty—vestibular dysfunction—Dr. Disher stated that he was uncomfortable doing so because he had not seen Bailey for a few months. *See id.* at 440. Further pressed, Dr. Disher did go on to state, “*Not having seen the patient and based on anything I’ve seen, I’d probably be more somewhere in mid to high Class II<sup>[4]</sup>,*” which would be somewhere between 5% and 10% PPI. *Id.* at 441-42 (emphases added). However, at no point did Dr. Disher ever firmly state an impairment rating for Bailey. Because the evidence is disputed and does not lead inescapably to a result contrary to the Board’s findings that no one other than Dr. Szynal rendered a competent impairment rating for Bailey, we affirm the Board’s Findings 5 and 7. *See Hill*, 651 N.E.2d at 787.

Bailey also objects to the Board’s Finding 13, which provides: “That Dr. Disher was not able to make a finding, to a reasonable degree of medical certainty, as to [Bailey’s] impairment for vestibular dysfunction because the only basis was self-serving, speculative and subjective facts supplied by [Bailey’s] counsel in his questioning, which Dr. Disher could not completely rely upon.” Appellant’s App. p. 8. Bailey first argues that this finding “was clearly not supported by substantial evidence.” Appellant’s Br. p. 20. We disagree. The Board’s conclusion that Dr. Disher was not able to make a finding as to Bailey’s impairment for vestibular dysfunction to a reasonable degree of medical certainty is supported by Dr. Disher’s testimony that he felt “uncomfortable giving an exact number.” Appellant’s App. p. 440. Likewise, the Board’s conclusion that the only

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<sup>4</sup> *See supra* note 3.

basis for Dr. Disher's impairment findings "was self-serving, speculative and subjective facts supplied by [Bailey's] counsel in his questioning" is supported by Dr. Disher's testimony that "I'm kind of accepting data that you guys are relating to me." *Id.* at 443-44.

But Bailey's main challenge to the Board's Finding 13 is that when the Board concluded that Dr. Disher was not able to make a finding "to a reasonable degree of medical certainty," Appellant's App. p. 8, "they misstated the legal criteria for admissibility of expert medical opinion," Appellant's Br. p. 21. As Dutchmen points out, however, Dr. Disher's deposition testimony was *admitted* into evidence. The Board simply did not give it much weight. Any argument that the Board should have admitted Dr. Disher's opinions into evidence, then, is misplaced.

Furthermore, while Bailey is correct that the Indiana Supreme Court has rejected "the notion that the admissibility and probative value of medical testimony is dependent upon the expert witness's ability to state conclusions in terms of 'reasonable medical certainty,'" the Court noted in the same case that "[t]he degree of certainty in which an opinion or conclusion is expressed concerns the weight to be accorded the testimony[.]" *Noblesville Casting Div. of TRW, Inc. v. Prince*, 438 N.E.2d 722, 726, 731 (Ind. 1982). Therefore, when the Board concluded that Dr. Disher was not able to make a finding as to Bailey's impairment for vestibular dysfunction "to a reasonable degree of medical certainty," it was properly commenting on the weight to be accorded Dr. Disher's testimony.

### **III. Permanent and Total Disability**

Next, Bailey challenges the Board's ultimate conclusion that he is not permanently and totally disabled. A claimant who seeks total permanent disability benefits bears the burden of persuasion. *Walker v. State, Muscatatuck State Dev. Ctr.*, 694 N.E.2d 258, 264 (Ind. 1998). The term "disability" refers to the injured employee's inability to work. *Id.* To establish a "permanent total disability," it is not necessary that the claimant prove his impairment or loss of bodily function is, or approaches, 100%, because an injured worker may experience a partial impairment and at the same time be unable to engage in reasonable forms of work activities. *Id.* at 264-65. Rather, the injured worker must simply establish that he cannot obtain or perform "reasonable" types of employment. *Id.* at 265. The reasonableness of the worker's opportunities is to be measured by his physical and mental fitness for them and by their availability. *Id.* Once the claimant has met this burden, the burden of producing evidence that reasonable employment is regularly and continuously available then rests on the employer. *Id.* Again, because Bailey is appealing from a negative judgment, we will affirm unless the evidence is undisputed and leads inescapably to a result contrary to the Board's conclusion that Bailey is not permanently and totally disabled. *Hill*, 651 N.E.2d at 787.

Here, the evidence regarding the extent of Bailey's disability is certainly not undisputed. The parties focus on the evidence provided by the two vocational experts, Young and Sher. Young, Bailey's vocational expert, described his meeting with Bailey as follows:

I could see immediately that he was having extreme difficulty in navigating. He utilized a cane that was well worn and supported himself on the table as he walked. When he spoke, he related with his eyes frequently closed, and one time he had to go to the bathroom during the interview

which was a matter of some urgency for him. Again, his movements were clumsy and seemed exceedingly difficult.

Appellant's App. p. 636. Young concluded his report by stating, "I have no hesitation whatsoever in stating that in my professional opinion there would be no work that Mr. Bailey could be expected to perform now or for the foreseeable future." *Id.* at 638.

However, as Dutchmen notes, several factors could have contributed to the Board's assessment of Young's credibility as a witness and the weight to be accorded to his testimony. First, Young testified that he has served as a vocational expert for Bailey's counsel, Attorney Parkman, twenty to twenty-five times and that of the approximately 500 worker's compensation claimants he has assessed, he has found all but twenty of them to be disabled. Second, Young noted that he was testifying without having seen the surveillance videos and stated that such videos are "ridiculous" and never play a part in his opinions. *Id.* at 570. Third, Young did not personally perform any tests on Bailey to determine his physical and mental capabilities or conduct a labor market survey or a transferable skills analysis. Fourth, Young concluded that Bailey is unable to work as a security guard based largely on Bailey's "equilibrium problems," that is, his vestibular dysfunction. *Id.* at 531. As noted above, however, there is substantial evidence that Bailey has little or no vestibular dysfunction, such as Dr. Disher's testimony that Bailey exhibited an aphysiologic sway, which suggests faking or exaggeration or anxiety.

Perhaps more damaging to Bailey's case than the potential weaknesses in Young's testimony, however, is the evidence from Sher, Dutchmen's own vocational expert.<sup>5</sup>

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<sup>5</sup> In his reply brief, Bailey's counsel characterizes several of Sher's conclusions as "inane" and "point blank insane." Appellant's Reply Br. p. 8-9. Such disrespectful, hyperbolic language has no place in appellate briefs and does nothing to further Bailey's cause.

Sher performed several tests on Bailey to measure his physical and cognitive abilities and conducted a transferable skills analysis and a labor market survey. She also relied heavily on the surveillance videos:

Mr. Bailey said the reason he is unable to return to work is because he is tired and he has a loss of balance. His doctor, Dr. Mahon, said he is not to use power tools as of January 2, 2002. He was using power tools during the time he was observed caring for his lawn in May 2003.

His functional evaluation states he is able to use his hands for repetitive action and can use his head and neck in a static position. It was suggested he return to work sitting. However, given the surveillance tape, it would appear that he is able to do more than just sit.

*Id.* at 856. Based on her evaluation and testing of Bailey and her review of the surveillance videos, Sher concluded that Bailey should be able to work in bench assembly or as a security guard and named several potential employers.

Specifically, Sher mentioned possible assembly jobs with Forge Industrial and Manpower in Elkhart, Indiana, and found that an assembler could earn between \$20,788.00 and \$26,183.00 in Elkhart or South Bend. Sher based her conclusion that Bailey could do assembly work in part on the surveillance video, which showed Bailey “walking and standing and operating vibrating tools.” *Id.* at 855. Sher’s conclusion that Bailey could likely find work as a security was based on Bailey’s experience in the military and as a police officer and Sher’s review of the surveillance videos. Commenting on the videos, Sher stated, “Since he was observed performing activities without the cane he is now a candidate for guard work.” *Id.* Sher noted that the Chicago Tribune listed security jobs in the LaPorte, Indiana, area and that “Securitas USA appears to have a number of contracts in the Indiana area.” *Id.* According to Sher, the Economic



Research Institute has calculated a mean salary of \$20,017.00 for first-year guards and an “all-incumbent average” of \$24,084.00. *Id.*

The evidence regarding the issue of whether Bailey is permanently and totally disabled is not undisputed. Each party hired a vocational expert, and the Single Hearing Member and the Board believed Dutchmen’s expert. It is the distinct province of the Board and its hearing members to weigh evidence and judge the credibility of witnesses in worker’s compensation cases. Bailey has given us no reason to invade that province. We therefore affirm the Board’s conclusion that Bailey is not permanently and totally disabled.

Affirmed.

ROBB, J., concurs.

SULLIVAN, J., concurs in result.